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No. 94-820

In The

Supreme Court of the United States

October Term, 1994

METROPOLITAN STEVEDORE COMPANY,

Petitioner,

v.

JOHN RAMBO,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF ON THE MERITS FOR RESPONDENT RAMBO

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QUESTIONS PRESENTED

1. Must a party seeking a 33 *U.S.C.* Section 922 Modification of an Award of Permanent Partial Disability prove that the Claimant has undergone a change in "physical condition"?

2. Should the employer's Application For Modification be denied because of the representations of its attorney to the injured worker that the award would be paid for life? (S. Ct. Rule 15.1)

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For The Ninth Circuit

BRIEF ON THE MERITS FOR RESPONDENT RAMBO

STATEMENT OF THE CASE

The Respondent, John Rambo, ("Rambo") a longshore frontman was injured within the course and scope of his employment on September 9, 1980 while employed by Petitioner, Metropolitan Stevedore Company, ("Metropolitan").

His claim for a non-scheduled permanent partial disability pursuant to 33 *U.S.C.* Section 901 *et seq.*, the *Longshore and Harbor Workers' Compensation Act* (hereinafter, "The Act") was set for Trial in 1983 before his Honorable Administrative Law Judge James J. Butler. Rambo was

represented by counsel and the employer was represented by James J. Wood. Among other things, the parties stipulated:

> "2. That . . . John Rambo . . . was employed as a longshoreman (frontman) by Metropolitan on September 9, 1980, on which occasion he sustained an injury arising out of and occurring in the course of his employment to his back and leg."; and,
>
> "6. That the employee sustained an overall current permanent partial disability equivalent to 22 1/2% of the whole person which the parties recognize as an 'economic disability' producing a weekly wage loss of $120.24 per week with an equivalent compensation rate of $80.16 per week for permanent partial disability."

(J.A. 3-4).

On November 28, 1983, his Honorable Administrative Law Judge, William J. Butler, issued a Decision and Order awarding Rambo $80.16 per week permanent partial disability benefits. (J.A. 2-6)

On October 30, 1989, "Metropolitan" filed with the Department of Labor an "Employer's Application For Modification, Section 922". (J.A. 7-10)

The Modification contained no medical evidence and did not allege a change in Rambo's physical condition. The sole evidence offered by the employer in support of the Modification was Rambo's post award earning records. (J.A. 9-10). The employer alleged, " . . . that he (Rambo) is not entitled to a wage loss of any kind at this time and that he has no economic disability as a result of this injury." (J.A. 8). The employer concluded that,

" . . . we can clearly show simply by the earnings information alone, . . . that this employee does not have a wage loss now . . . and that all compensation payments should be terminated." (J.A. 8,9).

A Formal Hearing on the Modification was convened on October 15, 1990 by his Honorable Administrative Law Judge Daniel Stewart ("ALJ").

At the commencement of the hearing, Rambo moved to dismiss the Application for Modification on the ground that the "Modification" failed to allege nor was there evidence of a change in Rambo's "physical condition". (J.A. 25-26).

The employer argued that:

1. A Section 922 Modification may be based on economic grounds (J.A. 28 and J.A. 41, Employer's Trial Brief); and,

2. Rambo's earnings demonstrate that there is no economic disability in this case. (J.A. 41)

The only documentary evidence admitted into the record was Rambo's earnings records. Each party's trial brief was made part of the Administrative Record. The employer's only witness was Rambo.

Rambo testified that he was currently employed as a longshoreman in the capacity of a crane operator. (J.A. 43). It took Rambo 20 years to achieve the seniority necessary to become a crane operator. (J.A. 52). A crane operator's job is less physically demanding then other longshore work he is eligible to perform. (J.A. 53).

Rambo testified that his physical condition had not changed since the date of the award of compensation benefits in 1983.

(J.A. 54).

Finally, Rambo testified that he was told by Mr. James J. Wood at the 1983 trial that if he accepted the sum of $80.16 per week, it would be paid for life. (J.A. 56-62).

In Open Court, on the record, Mr. Wood said:

> "Well, I hear what he is saying, Your Honor. I will have to call myself as a witness then, I guess."

(J.A. 58).

Mr. Wood did **not** call himself as a witness to deny Rambo's testimony. The only evidence in the record on this issue is the testimony of Rambo.

The "ALJ" granted the Modification and terminated Rambo's benefits.

Rambo appealed to the Benefits Review Board.

The Benefits Review Board, citing *Fleetwood v. Newport Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), affirmed, stating, " . . . that a mere change in a Claimant's wages could satisfy the 'change in conditions' requirement for modification." (J.A. 73).

Rambo appealed to the Ninth Circuit Court of Appeals. Only the Solicitor opposed the Appeal.

On Appeal Rambo raised three issues:

1. Must the party seeking to reopen a claim by filing a 33 *U.S.C.* Sec. 922 Modification meet a

threshold burden of showing a change in the Claimant's physical condition?

2. Should the employer in this case be estopped from filing a 33 *U.S.C.* Sec. 922 Modification because of the representation of its attorney to Rambo that the award would be paid for life?

3. Given the 1983 Award of benefits and the lack of any other evidence at the Modification trial except earnings records, should the Administrative Law Judge be directed to enter a nominal award to preserve Claimant's rights to petition for future modification?

The Ninth Circuit reversed, holding that, " . . . a party seeking to modify an award must prove that the Claimant has undergone a change in his physical condition." (J.A. 77).

The Ninth Circuit noted that " . . . (Metropolitan) relies exclusively upon the Fourth Circuit's decision in *Fleetwood*, which held that a mere change in the Claimant's wages could satisfy the 'change in conditions', requirement of 33 *U.S.C.*, Section 922." (J.A. 77).

The Ninth Circuit stated that,

"As the *Fleetwood* dissent noted, the Fourth Circuit's Rule is in direct conflict with the Ninth Circuit's Rule. See id. at 1235 (Warriner J., dissenting) (noting that beginning with the first opinion dealing with the question, (*McCormick*) handed down in 1933, and continuing thereafter, the Courts have uniformally interpreted the term, 'change in condition' in (33 *U.S.C.* Sec. 922) to refer exclusively to a **change in physical**

> **condition** of the employee receiving compensation." (emphasis added by the Ninth Circuit).

(J.A. 78).

The Ninth Circuit also noted that, as the *Fleetwood* dissent points out, " . . . the Fourth Circuit's rule conflicts with the position taken by the First and Fifth Circuits." (J.A. 78).

After the decision of the Ninth Circuit, the Solicitor filed a Petition For Rehearing on behalf of Director. On the last page of that Petition the solicitor virtually conceded that Metropolitan's Application For Modification should be denied in the interest of, " . . . justice under The Act." The Solicitor noted in a footnote:

> "6. Rambo has also contended throughout that the circumstances of the parties' agreement to the 1983 award's terms included representations that the award would not be modified (at least not downwards). Modification may be denied, despite an adequate demonstration that one of the statutory conditions for it exists, where changing the award would not 'render justice under The Act.' *McCord v. Cephas*, 532 F.2d 1377, 1380-1381 (D.C. Cir. 1976). In addition, the circumstances alleged by Rambo could be construed to effect an express waiver of the employer's right to seek modification of the 1983 award under Sec. 22. Accordingly, Rambo's contention warrants full consideration." Petition For Rehearing on behalf of the Director, p. 15 (August 5, 1994)

SUMMARY OF THE ARGUMENT

This appeal arises out of a claim made by Rambo pursuant to the provisions of the *Longshore and Harbor Workers' Compensation Act* (The Act). The Act was passed by Congress in 1927 to replace the common law remedy of tort litigation between maritime workers and their employers. The purpose of The Act was to provide worker's compensation benefits to maritime workers within admiralty jurisdiction. All worker's compensation systems permit the parties to reopen claims to modify previous awards to effect substantial justice between the parties. This is a recognition of the policy that no matter how competent the original trier of fact's diagnosis of the claimant's condition and earning prospects at the time of the initial hearing, that condition may later change markedly for the worse, or may improve, or may even clear up altogether. Many jurisdictions permit, for policy reasons, virtually an unlimited reopening system. That is, either party has an unlimited period of time after the initial award to seek a modification of the prior award based on ANY change in the circumstances upon which the prior award was based.

The Act as passed by Congress and amended ten times since 1927 adopted a severely limited reopening procedure. The parties have only one year from the last payment of compensation or rejection of the claim to reopen the claim. The parties may only seek to reopen the claim for a change in conditions or a mistake in fact. In 1938 and again in 1984 Congress had before it amendments which would have liberalized and revamped the reopening process and permitted unrestricted review of claims. Both times Congress rejected this liberalization. In

1983, the Senate Report urging liberalization went so far as to point out that although the time limitation for reopening was to be eliminated, " . . . the basis on grounds for seeking modification remains as under current law." S. Rep. No. 98-81, 98th Cong., 1st Sess., p. 37 (1983).

The first case to interpret the reopening process under The Act was decided in 1933. *McCormick S.S. Co. v. United States Employees' Comm'n*, 64 F.2d 84 (9th Cir. 1933). That case held in a clear, bright line ruling that in order for the parties to reopen a claim, not only must it be timely filed, but that there must be a showing that the claimant's "physical condition" had changed since the prior award. That clear, bright line rule that the phrase "change in conditions" meant a change in the claimant's physical condition was followed in every circuit, in every case,. and was adopted by the agency charged with administering The Act. That clear, bright line rule was in force and effect when each of the ten Amendments to The Act were adopted by Congress. The clear intent of Congress, unbroken since 1927 and implemented by the Courts is to severely restrict the reopening of claims. The parties may relitigate a claim under The Act only if a Petition For Modification is filed within a limited period of time and only upon a showing of a mistake in fact or a change in the claimant's "physical condition".

In 1985 the agency charged with the Administration of The Act changed its position on reopening of claims. The Director's new position adopted the liberal approach to reopening claims and urged that claims could be relitigated for ANY change in circumstances from which a trier of fact could conclude that there had been a change

in the Claimant's earning capacity. This change in position by the Director lead to the bizarre result in *Fleetwood v. Newport Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985), which is a two-judge majority opinion. This case is the sole aberration in a sixty-two year line of cases that recognizes that Congress' clear intent in passing and amending The Act was to establish a conservative, severely restricted procedure for reopening cases. It cannot be better stated than by the dissenting Judge in *Fleetwood* when he proclaimed:

> "Fifty years is a long time. And perhaps it can be argued that the Board's, and the Court's, and the **CONGRESS**' erstwhile interpretation of the phrase was inhumane, or unenlightened, or an anachronism, or something else even more disparaging. But it cannot be argued, I submit, that the prior interpretation was not and is not the law."

Id. at 1236.

The Director's opinion in Rambo is not entitled to deference because:

1. The Congressional intent on the precise issue before the Court is patently clear. That intent is the law and must be enforced;

2. The Director in Rambo is appearing as a litigant with the adversarial position of protecting the Special Fund;

3. The Director's inconsistent positions on this issue without adequate explanation vitiates deference.

Therefore, based upon the clear intent of Congress to enact a severely limited reopening process, sixty-two

years of virtually unbroken precedent and the sound logic of the Ninth Circuit Court of Appeals, it is respectfully requested that this Court affirm the decision of the Court below.

ARGUMENT AND AUTHORITIES

I. NEITHER THE OPINION OF THE BENEFITS REVIEW BOARD NOR THE DIRECTOR IS ENTITLED TO DEFERENCE IN THIS CASE.

The Second Circuit addressed the issue of the deference due to interpretations of The Act by the Benefits Review Board and the Director in *Director, Office of Workers' Compensation Programs v. General Dynamics Corp.*, 900 F.2d 506 (2nd Cir. 1990).

The *General Dynamics* court noted in *Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs*, 449 U.S. 268, 278 n. 18 (1980), that the Supreme Court suggested that the Benefits Review Board's views are not entitled to special deference because it performs only an adjudicatory function and is not charged with administrating The Act. *Id.* at 510. The Court then noted that the question of deference to be accorded to the Director was less clear. *Id.*

The Court found persuasive the reasoning in *Director, Office of Workers' Compensation Programs v. O'Keefe*, 545 F.2d 337, 343 (3rd Cir. 1976). The *General Dynamics* Court pointed out that, " . . . when the Director appears as a litigant in an adversarial proceeding before the Board, it

is inappropriate to grant special deference to the Director's litigating position . . . " *General Dynamics, supra,* at 510. The Court reasoned that, "If deference were accorded under such circumstances, claimants would be effectively deprived of the right to impartial review." *Id.*

The *General Dynamics* court concluded that, " . . . in light of the relationship between the roles of the Board and the Director in resolving questions of law, and the Director's adversarial position in this litigation, the Director's interpretation of The Act here is not entitled to any special deference." *Id.*

In this case Metropolitan was granted 8(f) relief. Rambo's benefits are being paid by the Special Fund. The Secretary is charged with the responsibility of administering the Special Fund and defending it. (33 *U.S.C.* Section 944). Only the Director appeared in the Ninth Circuit to oppose Rambo's appeal of the decision of the Benefit's Review Board. If the decision of the Ninth Circuit Court of Appeals is reversed, the Special Fund would benefit. Because of the clear adversarial position of the Director in this case, the Director's interpretation of the Statute should be given no special deference. (See also *Malcomb v. Island Creek Coal Company,* 15 F.3d 364 (4th Cir. 1994) holding that deference should not be afforded in a black lung case where there were different interpretations of the Board's own regulations).

Finally, an agency's construction of the statute which it administers is entitled to deference only when the intent of Congress in enacting the statute is unclear. Where Congress has clearly expressed its intent, Courts

must reject a contrary administrative construction. *Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intent is the law, and must be given effect. *Western v. Luther*, 163 U.S. 331, 342 (1896).

In the case at bar the precise question before the Court is whether Congress intended to adopt a severely restrictive system for reopening previously litigated claims or adopt the "modern approach" allowing continuous monitoring of claims, forever adjusting the grievances of the parties, real or imagined.

The answer as to the intent of Congress can easily be ascertained by reviewing the legislative history of Section 22 and the cases that interpret that Section in a chronological order.

II. LEGISLATIVE HISTORY, PRECEDENT AND THE PRACTICAL ADMINISTRATION OF THE ACT MANDATE THAT THIS COURT AFFIRM THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IN THIS CASE.

The original Longshoremen's and Harbor Workers' Compensation Act was enacted by Congress on March 4, 1927. The Act was to provide worker's compensation benefits to maritime workers within admiralty jurisdiction. It was the modern substitute for the old common law remedy and was recognized as necessary in the interest of social justice between employers and employees.

H.R. Rep. No. 1767, 69th Cong., 2d Sess., pp. 19-20 (1927).

Section 22 of the Original Act was as follows:

> "Sec. 22. Upon his own initiative, or upon application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time during the term of an award and after the compensation order in respect of such award has become final, review such order in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, increase, or decrease such compensation. Such new order shall not affect any compensation paid under authority of the prior order."

Congressional Record-Senate, 2d Sess., March 4, 1927, S.5904.

It should be noted that Section 22 referred to the procedure contained in Section 19, which in turn referred to Section 13 which Section sets one year as the limitation period for filing claims.

The first reported case interpreting Section 22 was *McCormick S.S. Co. v. United States Employees' Compensation Comm'n*, 64 F.2d 84 (9th Cir. 1933).

In this 1933 case, the injured worker suffered a non-scheduled industrial injury on February 11, 1928. The Deputy Commissioner entered an order awarding the worker $3.96 per week permanent partial disability.

Thereafter the Deputy Commissioner modified the award and increased the worker's benefits to $8.21 per week. The Employer Appealed.

The Ninth Circuit stated that:

> "The Order complained of in this proceeding is as follows:
>
> > ' . . . It appearing to the Deputy Commissioner . . . that his physical condition has not changed since the last order, that his wages have diminished since said date because of decreased stevedore work resulting from depressed conditions." *McCormick, supra,* at 85.

The Ninth Circuit held that, "The applicant's petition for a Modification of the compensation Order was not based upon a CHANGE IN HIS PHYSICAL CONDITION but upon his decreased EARNINGS. . . . Section 22 of The Act (33 U.S.C. Sec. 922) authorizes a modification of the order due to a 'change in conditions' but we do not think this applies to a change in EARNINGS DUE TO 'ECONOMIC CONDITIONS'." *Id.* at 85. (Emphasis added).

The Order was vacated and the decision of the Deputy Commissioner reversed.

Since the *McCormick* Court announced its clear, bright line rule that the parties can reopen a claim only upon first showing a change in the claimant's condition, The Act has been amended ten times. The first Amendment to The Act was on May 26, 1934. That Amendment changed Section 922 to read as follows:

> "Sec. 22. Upon his own initiative, or upon the application of any party in interest, on the

ground of a change in conditions **or because of a mistake in a determination of fact by the deputy commissioner**, the deputy commissioners may, at any time **prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued**, review **a compensation case** in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation. Such new order shall not affect any compensation **previously** paid, **except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the deputy commissioner with the approval of the Commission.**" H.R. Rep. No. 1244, 73d Cong., 2d Sess., p. 6 (1934).

The Report of both the House and Senate are identical. It is as follows:

"Sixth Amendment. Section 5 of H.R. 8057 (and Section 5 of S. 2794) amends section 22 of the existing act so as to broaden the grounds on which a deputy commissioner can modify an award and also while **strictly limiting** the period, extends the time within which such modification may be made . . . The amendment

> is in line with the recommendation of the Commission except that it **limits** to 1 year after the date of the last payment of compensation the time during which such modification may be made. The amendment also permits an increase or decrease in the compensation under a modifying award when changed conditions or a mistake in a determination of fact makes such modification desirable in order to render justice under The Act, such modifying award to date from the time of the accident." (Emphasis added).

S. Rep. No. 588, 73d Cong., 2d Sess., p. 3 (1934); H.R. Rep. No. 1244, 73d Cong., 2d Sess., p. 4 (1934).

This legislative history unequivocally demonstrates that Congress intended to adopt a procedure which strictly limits the reopening process.

Clearly Congress considered whether to allow unrestricted reopenings of claims and rejected that approach. The clear, bright line rule of *McCormick* was in place and was precedent when this amendment was enacted.

The first case to address Section 922 of The Act as amended by Congress in 1934 was *Atlantic Coast Shipping Co. v. Golubiewski*, 9 F. Supp. 315 (D.Md. 1934).

In this case the court stated:

> "The single question presented is whether an injured employee who has been receiving compensation for temporary partial disability under a valid order of the Deputy Commissioner ceases to be entitled thereto by reason of his imprisonment in the penitentiary under a sentence for life consequent upon conviction for murder in the first degree." *Id.* at p. 315.

The Deputy Commissioner denied the employer's Petition to Modify pursuant to Section 922. The employer appealed and just as Metropolitan in this case, cited 33 *U.S.C.* Sec. 902 (10), which defines disability as:

> "Disability means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

The District Court which was charged with judicial review at that time, noted that the employer's, " . . . argument is that one confined in the penitentiary is thereby precluded from earning wages and therefore it is said that the disability for the original injury is no longer the effective cause of loss of wages." *Atlantic Coast Shipping Co., supra,* at 316.

The Court answered this argument by stating:

> "However, in my opinion the exact legal question depends upon the proper construction and application of Section 22 of The Act (33 *U.S.C.* Sec. 922) which provides for modification of awards." *Atlantic Coast Shipping Co., supra,* at 316.

In answering this question the Court stated, "Looking at the context (of Section 922) in relation to the whole scope and general purposes of The Act, the most natural meaning to be given to the expression 'change in conditions' would seem obviously to refer to a change in the PHYSICAL CONDITION of the employee caused by the accident." *Atlantic Coast Shipping Co., supra,* at 317. (Emphasis added).

After an exhaustive review of domestic cases, English cases and treatises, the Court stated:

> "Considered on principle, apart from the above authorities, there would seem to be little support for plaintiffs' contention in these cases. Their argument seems necessarily to be based on the underlying assumption that the payments for temporary partial disability are a matter of grace rather than of obligation to the injured employee. This view is erroneous. The legal theory inherent in the Longshoremen's Act, as in Workmen's Compensation Acts generally, is the substitution of a certain amount of compensation (variable within limits) to the employee for his common law right of action which is taken away by the statute. While the payments for partial disability are spread over a period of time, for considerations of public policy, the obligation of the employer arises from the fact of the injury in the course of employment and accrues at the time of the injury. The subject matter has been heretofore discussed to some extent by the Circuit Court of Appeals for this Circuit in *Wheeling Corrugating Co. v. McManigal*, 41 F. (2d) [sic] 593, 595; *United States Casualty Co. v. Taylor*, 64 F.2d 521 and *Bowen v. Hockley*, 71 F.2d 781; also in the opinion of this court in *Pyrites Co. v. Davison Chemical Co.*, 4 F. Supp. 294, 297 (affirmed sub. nom. *Hockley v. Wilson* (C.C. A.) [sic] 70 F.2d 108), where it was said:
>
> 'It is a statutory substitute for the common law right of action by the employee which might culminate in a judgment for a capital sum as damages. The obligation of the employer to indemnify for the loss is in its nature a single

entity just as was the common law chose in action of the employee. That it is to be liquidated in periodic partial payments does not transmute its legal nature from an entire obligation into several separate obligations each arising from the several periodic payments required to be made, until the whole is paid.' " *Atlantic Coast Shipping Co., supra,* at 318.

The Court concluded by stating:

"Finally it may be observed that the employee's confinement in the penitentiary will not, of course, preclude the employer from further proceedings before the Deputy Commissioner for modification of the award under section 922 of 33 *U.S.C.A.* when the employee's change in physical condition, with respect to his capacity to earn wages if he were free, may justify a discontinuance of the payments for temporary partial disability or reduction in the amount thereof.

I conclude, therefore, that the orders of the Deputy Commissioner in both the cases are in accordance with the law and should not be set aside." *Atlantic Coast Shipping Co., supra,* at 318-319.

In 1935 and 1936 Congress considered amending The Act. The report of both Houses regarding the effect of the proposed amendments of Section 922 is as follows:

"Section 9, In the amendment of Section 22 of the Longshoremen's Act as contained in The Act of May 26, 1934, no provision was made for the application of the enlarged authority therein provided to cases in which the action of the deputy commissioner has been a rejection of the

> claim. In such a case, in which there has been no 'payment of compensation', the amendment failed to provide for reopening. Experience indicates that the same reasons for reopening, as provided for in this section, may exist where the claim has been rejected as in the case where compensation has been paid either with or without an award. The purpose of this amendment is to extend to such cases the same provisions which now apply in connection with other cases finally acted upon by the deputy commissioner."

S. Rep. No. 1199, 74th Cong., 1st Sess., p. 4 (1935); H.R. Rep. No. 2237, 74th Cong., 2d Sess., p. 5 (1936).

While this Amendment was being considered by Congress, the Ninth Circuit decided *Pillsbury v. Alaska Packers Ass'n*, 85 F.2d 758, (9th Cir. 1936), rev'd on other grounds, 301 U.S. 174 (1937). In that decision, referring to Sec. 922, the Ninth Circuit noted that, "The expression 'change in conditions' refers to a change in the physical condition of the employee." *Pillsbury, supra* at 960 citing, *Atlantic Coast Shipping Co. v. Golubiewski*, 9 F. Supp. 315, 317 (D.C. Md. 1934).

In 1938 Congress amended Section 922 and its reports were identical to the paragraph attached to its proposed amendment in 1935 and 1936 set forth above. S. Rep. No. 1988, 75th Cong., 3d Sess., p. 13 (1938).

Again Congress clearly considered the issue of allowing unrestricted reopening of claims. It rejected unrestricted reopenings and limited to one year the time limit to reopen after the initial claim was rejected. The clear, bright line rule of *McCormick* had been in place for five

years and had been judicially approved in two subsequent court rulings.

On April 11, 1944 the 5th Circuit decided *Burley v. Welding Works, Inc., v. Lawson*, 141 F.2d 964 (5th Cir. 1944). In that case the injured employee suffered a non-scheduled injury on November 23, 1940. The Deputy Commissioner entered an Order on July 29, 1942 awarding the Claimant permanent partial disability benefits at the rate of $8.00 per week. On August 5, 1942 the employer filed a Section 922 Modification supported by the injured worker's increased earnings records. Modification was denied. The employer appealed.

The 5th Circuit stated:

> "It has been uniformly held that the term 'change in conditions' in Section 22 of The Act, which authorizes the modification of a previous award, means a change in the employee's physical condition, and not other conditions." *Burley Welding Works, Inc., supra*, at 966, citing *McCormick, supra*, and *Pillsbury, supra*.

The Order of the Deputy Commissioner was affirmed and the Petition For the Modification dismissed.

On October 9, 1974 the Benefits Review Board decided *Rizzi v. The Four Boro Contractor Corp.*, 1 BRB 130 (1970).

In this case the injured worker in 1966 was awarded a non-scheduled award for permanent partial disability. In 1971 he filed a Section 922 Petition For Modification alleging permanent total disability. At trial the Administrative Law Judge denied the Modification finding that

the Claimant's total disability was unrelated to his industrial injury.

The Benefits Review Board stated:

> "The Act provides that a compensation order may be reviewed on grounds of change in conditions or because of mistake in a determination of fact by the deputy commissioner. 33 *U.S.C.* Sec. 922. The term, 'change in condition', means alteration of the physical condition of the employee caused by the accident. *Bay Ridge Operating Co. v. Lowe,* 14 F. Supp. 280 (S.D. N.Y. 1936). Further, to qualify for additional benefits, such change in condition must have occurred between the time of the award which is being modified and the time of application for modification. *Jarka Corp. v. Hughes,* 299 F.2d 534 (2nd Cir. 1962)."

Rizzi, supra at p. 131.

The Board affirmed the order of the Administrative Law Judge and the Modification was denied. It should be noted that in this case the agency charged with the administration of The Act took the opposite position to the present interpretation of "change in conditions" now taken by the Director in the instant case.

On May 14, 1981, Senate Bill 1182 amending The Act was introduced. It was identical with H.R. 25 also proposed in the 97th Congress. The Senate passed Senate Bill 1182 on July 27, 1982. When received by the House of Representatives, the bill was referred to the Committee on Education and Labor. The 97th Congress adjourned

without enacting any amendments to The Act. Congressional Record – Senate, 98th Cong., 1st Sess., January 26, 1983, S.576.

On January 26, 1983 Senate Bill 38 was introduced in the Senate and was virtually identical with Senate Bill 1182. Congressional Record – Senate, 98th Cong., 1st Sess., January 26, 1983, S.570. On June 16, 1983, Senate Bill 38 again passed the Senate. H.R. Rep. No. 98-570, 98th Cong., 1st Sess. pp. 1-2 (1983).

With regard to Section 22 of The Act the Senate Report of May 9, 1983 stated at p. 37:

"MODIFICATIONS

> Consistent with the change made in section 8(h) on the issue of wage earning capacity, the one year time limit for modification of awards has been **eliminated**. Although the time limit has been changed, **the basis or grounds for seeking a modification remains as under current law**. It is the committee's intent that this amendment also will preclude any future proceeding for modification of a settled case in accordance with section 22. This amendment promotes equity by permitting **all parties to apply for modification of awards at any time after an award is entered**. The one year limitation was unreasonably short in light of the long term effects of the major industrial injuries sustained by workers covered by The Act. As a consequence, administrative law judges felt compelled to award benefits for wage loss at the rate of 1 percent in cases where rejection of the claim would have required a request for modification within a year, whether or not such a new claim was justified. The new approach is far more realistic,

> allowing claimants, for example, to apply for increased benefits for wage loss or for greater physical disability at a time when the full effects of an injury may manifest themselves. **Requests for modification will no longer be necessary simply to keep the statute of limitations from running.**" (Emphasis added). S. Rep. No. 98-81, 98th Cong., 1st Sess. pp. 37-38 (1983).

At p. 36 of the same Senate Report, Section 8(h) was discussed as follows:

> "WAGE EARNING CAPACITY
>
> Section 8(h) was amended by deleting the phrase 'as it may naturally extend into the future.' The remainder of the section is unchanged. The deletion is intended to reduce speculation on the part of fact finders as to the extent of future loss of wage earning capacity. The result will be a realistic assessment of the claimant's current loss of wage earning capacity along with a concomitant predictability which will lead to ease of insurability."

Specifically the proposed amendment to Section 22 was:

> "MODIFICATION OF AWARDS
>
> SEC. 14. Section 22 is amended by striking all after 'the deputy commissioner may' through 'rejection of claim'." S. Rep. No. 98-81, *supra* p. 11.

In the House of Representatives Report of November 18, 1993 in its Section by Section analysis of Section 22 it is stated:

> "Section 14 amends section 22 of The Act to permit the modification of an award or review

of a compensation claim **at any time** on the grounds of changed circumstances or mistakes. (Emphasis added). H.R. Rep. No. 98-570, 98th Cong., 1st Sess., p. 29 (1983).

After different versions of the Amendments passed both houses of Congress, the bills were referred to Conference Committee.

In the Conference Report of September 14, 1984, the Amendment of Section 8(h) was withdrawn. Conference Report on S. 38, Congressional Record – House, September 14, 1984, H.25495.

Section 22 was amended as follows:

"MODIFICATION OF AWARDS

SEC 16. Section 22 is amended –

(1) by inserting "(including an employer or carrier which has been granted relief under section 8(f))" after "party in interest";

(2) by inserting "(including a case under which payments are made pursuant to section 44(i))" after "review a compensation case"; and

(3) by adding at the end thereof the following new sentence: "This section does not authorize the modification of settlements". *Id.* at p. 25497.

In the Joint Explanatory Statement of the Committee of Conference it is stated:

"SPECIAL FUND

Conference substitute . . .

By permitting an employer or carrier to remain a party in a special fund case, **the conferees do not intend to expand or contract the rights of**

> **an employer or carrier beyond those prevailing in a non-special fund case**. (Emphasis added). *Id.* at S.25502.

On September 20, 1984 the report of the Committee of Conference was placed before the Senate. Conference Report on S.38, Congressional Record – Senate, September 20, 1984, S.26296.

Mr. Hatch noted that, " . . . this measure is the product of literally a decade of intense debate, close scrutiny, and hard negotiation . . . Senate Bill 38 reflects a fragile consensus carefully crafted over the last several years." *Id.* at S.26297.

As enacted the 1984 Amendments rejected the original version of both the Senate and House bill which permitted unlimited reopening of claims by the parties to adjust or terminate benefits previously awarded. Congress clearly and specifically chose to retain the then 51 year system that permitted reopening of claims only based upon a change in the Claimant's physical condition and then only within the one year period. Congress expressly rejected the original amendments that contained the philosophy of a never ending open period for reopening claims. Congress clearly expressed its will to retain a restrictive system, limiting the reopening of claims after a prior award had become final. The clear, bright line rule of *McCormick* and its progeny was 51 years old when the amendments became law and the Congressional scheme adopted in 1984 retained the then existing system of severely restricting the reopening of claims.

While Congress was in the middle of amending The Act, on March 19, 1982 the First Circuit decided *General Dynamics v. Director, Office of Workers' Compensation Programs*, 673 F.2d 23 (1st Cir. 1982).

In this case the employer sought to reopen Under Section 922 in order to raise the defense of 8(f) relief. The Court stated, "Since there was no change in claimant's physical condition, (Footnote 6), in order to reopen the case the employer must show that there was a mistake in the determination of a fact". *Id.* at 25.

> "Footnote 6. Courts uniformally have held that a 'change in conditions' means a change in the employee's 'physical condition', not other conditions. E.g. *Burley Welding Works, Inc., v. Lawson*, 141 F.2d 964 (5th Cir. 1944)." *Id.* at 25.

It is of interest that the Court noted:

> "We are not insensitive to the employer's claim that reopening here might be said to be in the interest of justice. Nevertheless, we hold that such a reopening would not serve the orderly administration of justice which depends in no small part upon finality of judicial determinations." *Id.* at 26.

Verderane v. Jacksonville Shipyards, Inc., 772 F.2d 775 (11th Cir. 1985) was decided on September 30, 1985 by the 11th Circuit. In this case the Administrative Law Judge found the Claimant permanently and totally disabled. The employer appealed and the Benefits Review Board agreed the Claimant was permanently and totally disabled but remanded on the issue of coverage under The Act. At the Deputy Commissioner level the employer attempted to raise 8(f) relief. The Administrative Law

Judge denied 8(f) relief for failure to timely raise this defense and found that the Claimant was covered under The Act. While this case was pending a United States Supreme Court decision intervened on coverage and the Board ruled that the injured worker was covered under The Act. The Board reinstated the original permanent and total award. The employer appealed on the issue of 8(f). The employer argued that it could reopen under Section 922 and raise 8(f) for:

1. change of conditions, or,

2. mistake in determination of fact. (Presumably the change of conditions was the intervening decision of the U.S. Supreme Court).

The 11th Circuit noted:

> "A 'change in conditions', for purposes of Section 22 refers to a change in an employee's physical condition." Citing *General Dynamics, supra.*

The Court concluded that, "Because the Claimant's physical condition has not been shown to have changed during the time he received the awards, the inquiry advances to the second issue: whether there was a mistake in the determination of a fact." The Court concluded there had been none and affirmed the Board's ruling.

This review of legislative history and case precedent provides a framework with which to examine the authority relied upon by Petitioner.

Rambo agrees that Professor Larson's work is instructive on the issue of reopening of compensation

claims. This work does address the competing philosophies concerning the reopening of previously litigated claims. (See 3 *Larson, The Law of Workmens' Compensation*, Sec. 81.00 *et seq.* (1994)). However, it is respectfully submitted that the author's entire analysis, not merely portions, should be considered. The relevant sections of *Larson* are:

"Sec. 81. REOPENING AWARDS

Sec. 81.00 At the administrative level, awards can be reopened by the compensation board for modification to meet changes in claimant's condition, such as increase, decrease or termination of disability. For reasons of administrative practicality, time limits within which such petitions may be brought are usually imposed. On a reopening for changed condition, no other issues may be relitigated, and the claimant's evidence must bear directly upon the comparison between his former and his present disability. A few jurisdictions afford their commissions broad power to reopen cases in the interest of justice or for any good reason. *Larson, supra,* p. 15-956.

Sec. 81.10 Summary of reopening problems

In all states, some kind of provision is made for reopening and modifying awards. This provision is a recognition of the obvious fact that, no matter how competent a commission's diagnosis of claimant's condition and earning prospects at the time of hearing may be, that condition may later change markedly for the worse, or may improve, or may even clear up altogether. Under the typical award in the form of periodic payments during a specified maximum period

or during disability, the objectives of the legislation are best accomplished if the commission can increase, decrease, revive, or terminate payments to correspond to claimant's changed conditions. **Theoretically**, then, commissions ought to exercise **perpetual** and **unlimited** jurisdiction to **reopen cases** as often as necessary to make benefits meet current conditions. But the **administrative and practical** difficulties of such a course have led to **severe limitations** on the power to reopen and alter awards. The most serious administrative problem lies in the necessity of preserving the full case records of all claimants that have ever received any kind of award, against the possibility of a future reopening. Moreover, any attempt to reopen a case based on an injury ten or fifteen years old must necessarily encounter awkward problems of proof, because of the long delay and the difficulty of determining the relationship between some ancient injury and a present aggravated disability. Another argument is **that insurance carriers** would never know what kind of future liabilities they might incur, and would have difficulty in computing **appropriate reserves**." *Id.* at pp. 15-956-15-957.

With respect to reopening an award for change in condition, *Larson* states:

"Sec. 81.30 Reopening for change in condition.

Sec. 81.31 What constitutes change in condition.

Sec. 81.31(a) Basic rule: change in physical condition required.

The 'change in condition' which justifies reopening and modification is ordinarily a

> change, for better or worse, in claimant's physical condition." (Citing 17 pages of footnotes) *Id.* at pp. 15-988-15-1016.

The author's exhaustive review of virtually every state's reopening system emphasizes that there are essentially two competing concepts regarding reopening of claims. Both concepts are grounded on conflicting policy considerations. On the one hand some jurisdictions permit unlimited reopening of claims for an unlimited period of time based upon virtually any change in circumstances. On the other hand some jurisdictions severely limit reopening of claims to a short period of time and only if there has been a change in the employee's physical condition since the prior award.

The Petitioner also relies upon *Fleetwood v. Newport Shipbuilding & Dry Dock Co.*, 776 F.2d 1225 (4th Cir. 1985) which was decided November 5, 1985 by the 4th Circuit Court of Appeals after the 1984 Amendments were enacted.

The decision is a two-Judge majority opinion with a vigorous dissent. In its opening paragraph the majority notes that Claimant received an award for a back injury that occurred on July 11, 1975 and an award was made pursuant to The Act and as, " . . . amended at 33 U.S.C. Sec. 901-950 in *1982*." (*Sic*).

The Court stated, " . . . about two years . . . ", after the award, " . . . the employer applied for a modification of the compensation order, arguing that a 'change in conditions' had occurred in that *Fleetwood* had acquired new job skills and was working as a production coordinator. *See* 33 *U.S.C.* Sec. 922 ('employer or employee may

obtain modification of award based upon a change in conditions')." *Id.* at p. 1227.

The majority stated that, "*Fleetwood* argued that his original award could not be modified because under Section 22 of the statute the term 'change of conditions' included only a change in the worker's physical condition and the fact that a worker was earning higher wages in his new job than in his pre-injury job was irrelevant as long as there was no improvement in the condition of his back" *Id.* at p. 1227.

The majority opinion held that a change in an employee's wage earning capacity could be the basis for a Sec. 22 Modification without a change in the employee's physical condition, " . . . because (this) is consistent with the statute's purpose and is a reasonable view of the statutory language." *Id.* at p. 1228.

The majority in rejecting the clear bright line rule of *McCormick* comments:

> "We reject this reading of the statute because it is not in keeping with the purpose of The Act, which is to compensate workers for injuries that affect their wage-earning capabilities." *Id.* at p. 1229.

This does not advance the ball!

The issue is not whether to compensate for injures but rather the issue is what has Congress said about permitting parties to reopen claims and relitigate finished business. Congress clearly in the 1938 and 1984 Amendments rejected unrestricted reopening of claims. Congress had before it this very issue in 1981, 1983 and 1984. Congress chose not to allow the Department of Labor and

the Office of the Administrative Law Judges to build their empire by scrutinizing each claim ad infinitum. Congress retained a severely restricted system of reopening claims. The *Fleetwood* majority by rejecting the clear, bright line rule of *McCormick* attempts by judicial decision to enact the philosophy for reopening of claims clearly rejected by Congress.

The majority's tortured attempt to distinguish fifty-two years of case precedent and its citation of cases that do not involve the reopening procedure is ingenuous at best.

In a further anachronism, the *Fleetwood* majority stated that, " . . . the statute itself provides that at an initial determination hearing, at a modification hearing as well, any factors which may affect the future earnings of the Claimant are to be taken into consideration." *Id.* at p. 28.

It is respectfully submitted that at the initial hearing the beginning and end all inquiry is, has the industrial worker suffered a physical injury that was caused by his employment? If the answer is NO, that ends all inquiries. If the answer is YES, in a non-scheduled case, the *Fleetwood* majority is correct and the factors they cite are addressed to determine if there has been a loss of wage earning capacity.

In spite of its statement to the contrary, the *Fleetwood* majority uses two different methods in considering claims at the initial hearing and at the reopening hearing. In fact they invert the process at the reopening hearing and permit modification without regard to a consideration of the claimant's physical condition.

Under the *McCormick* approach which implements the Congressionally approved system, at the reopening hearing the focus is initially directed at the employees physical condition. If there has been no change in the claimant's physical condition, reopening is denied; just as at the initial hearing if there was no physical injury, the claim is dismissed. Only if there has been a change in the Claimant's physical condition under the *McCormick*-Congressional scheme does the reopening hearing proceed to a consideration of loss of wage earning capacity. Thus the *McCormick*-Congressional approach makes parallel inquiries at both the initial hearing and the reopening hearing.

The *Fleetwood* majority in tacit recognition that it was adopting a liberal reopening policy in contradiction of the Congressional approach comments that, "We cannot solve the problem of the short statute of limitations by completely excluding modifications on the basis of a change in wage-earning capacity."

This is precisely what Congress did! Congress chose to retain the Statute of limitations AND the fifty-one year old clear, bright line rule that severely LIMITS the ability of the PARTIES to reopen cases.

One can therefore only feel empathy for Judge Warriner's frustration when he states in his dissent:

> "Fifty years is a long time. And perhaps it can be argued that the Board's, and the Courts', and the Congress' erstwhile interpretation of the phrase was inhumane, or unenlightened, or an anachronism, or something else even more disparaging. But it cannot be argued, I submit, that

> the prior interpretation was not and is not the law." *Id.* at 1236.

In summary the clear intent of Congress was to adopt a severely limited reopening procedure and this intent has been followed in all cases except the *Fleetwood* majority. It is respectfully submitted that the *Fleetwood* majority opinion is an aberration that should not be followed. Likewise, in the face of the clear intent of Congress to severely limit reopening of claims the opinion of the Director should not be afforded deference. *Western v. Luther, supra.*

III. OTHER ISSUES RAISED BY RAMBO ON APPEAL AND ON WRIT OF CERTIORARI

Rambo raised three issues on Appeal to the Ninth Circuit. The defining legal issue before the Ninth Circuit as well as this Court is of course the question of under what circumstances can a claim be reopened under 33 *U.S.C.* Section 922. The other two issues raised by Rambo that became moot by the Ninth Circuit's decision were:

> 1. Should the employer be estopped from filing a 33 *U.S.C.* Sec. 922 Petition For Modification because of the representation of its attorney to "Rambo" that the award would be paid for life?
>
> 2. Given the 1983 Stipulated Decision and Order Awarding Permanent Disability Benefits, "in the interest of justice", should this case be remanded for the entry of a nominal award of loss of wage earning capacity?

Should this Court decide that the prerequisites to reopen a claim were satisfied in this case, a determination of Rambo's alternative grounds for appeal should be addressed. It is respectfully requested in this event that this Court remand this case to the Ninth Circuit Court of Appeals for resolution of the remaining issues in this case.

CONCLUSION

The Director's change in position to one advocating a liberal reopening process is of course explicable. This modern liberal approach will without doubt lead to more people being employed by the Department of Labor to forever monitor claims. What is inexplicable is that the insurance industry and the employers groups support a liberalization of the Congressional scheme. The *Fleetwood* majority decision opens the door to virtually unrestricted reopening of prior awards. It is wondered if the insurance industry and the employer groups will be willing to accept the modern, liberal *Fleetwood* approach when future petitions to reopen are based simply on a showing of decreased earnings.

Finally, it should be emphasized that when the parties in this case **stipulated** to Rambo's original award, the clear, bright line rule of *McCormick* was fifty years old. *Fleetwood* was two years in the future. Clearly, when the parties made their agreement, their expectations were that the arrangement would **only** be modified if there were a change in Rambo's **physical condition**. Based on this expectation, coupled with the fact that Congress

clearly intended to adopt a restricted reopening process and the fact that the Courts have implemented this intent for sixty-two years, this Court should affirm the Ninth Circuit's judgment herein.

Therefore, for the aforesaid reasons, the Court should affirm the Ninth Circuit's judgment herein.

Respectfully submitted,

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